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EVERGRIP PRESTRESSING SDN. BHD.

v.

KEN CONSTRUCTION & TRADING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

VC GEORGE J

b

[CIVIL SUIT NO. C 1682/85]

4 JANUARY 1991

CONTRACT: *Sub-contract - Terms and conditions of quotation - Whether part of purchase order - Conduct of parties - Works done - Delay - Absence of particulars - Withholding of progress payments - Retention money - Deduction and counterclaim - Merits.*

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The defendants in this case were appointed main contractors for the erection of a reinforced concrete bridge, and the plaintiffs were sub-contractors responsible for prestressing work on the bridge. The plaintiffs claimed the sum of RM185,297 being the balance due on the sub-contract from the defendants which the plaintiffs claim should have been paid as progressive payments. The said amount was inclusive of the sum of RM5,083 which the plaintiff had billed the defendants as being the cost of 170 pieces of “trumpets” which had been supplied to the defendant.

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The plaintiffs’ claim was admitted by the defendants’ save for the amount of RM5,083. The defendant, however contended that a sum of RM12,000 was to be deducted from the admitted amount being the hire-charges claimed by the defendants against the plaintiffs in respect of cranes which the defendants had provided to the plaintiffs for carrying out the prestressing works.

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Further, the defendant contended that the plaintiffs had failed to carry out the sub-contract works with due diligence and within the scheduled time as a result of which the defendants had suffered loss and damages; they therefore counterclaimed special damages which amount the defendants say should be set-off against the plaintiffs’ claim.

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The issue for the Court was whether the terms and conditions set out in AB79 and AB80 (the terms and conditions relating to the quotation, (AB3)) are to be used as being part of AB10 (the purchase order). In AB10, reference was made to 3 terms and conditions which were not dealt with at all in AB79 and AB80.

Held:

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[1] The terms set out in AB79 and AB80 are relevant terms and conditions without which there could not be a meaningful contract between the parties and without which the contract could even be said to be bad for uncertainty.

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[2] In the absence of evidence to the contrary as to the nature of progress payments which the defendants are referring to, the plaintiffs’ offer, namely AB3, AB79 and AB80 must be examined. Reading the documents AB3, AB79, AB80 and AB10 in that context and assuming that the intention of the parties was to arrive at a contract that is not bad for uncertainty, it is clear that AB10 was meant to be read with AB79 and AB80.

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[3] The plaintiffs were entitled according to the terms set out in those documents to be paid progressively on a monthly basis on certain conditions based on the total worth of work done and materials on site less 10% to be held back as a retention fund but the amount retained not to exceed in the aggregate 5% of the lump sum contract sum.

[4] All the terms set out in AB79 and AB80 were accepted unless rejected or watered down or amended by AB10. Condition 4 in AB10 gives life not only to the progress payment condition in AB79 and AB80 but to all the other terms and conditions set out therein. This conclusion was arrived at on a balance of probability without resort to the later conduct of the parties. **a**

[5] The conduct of the parties before and after the issue of AB10 demonstrates that at all relevant times they conducted themselves on the basis that the terms and conditions set out in AB79 and 80 were terms and conditions of the sub-contract. **b**

[6] The plaintiffs have failed to prove that there was a contractual or other obligation on the part of the defendants to pay for the trumpets.

[7] The defendants had no business withholding progress payments when they were already holding back 10% as a retention fund. **c**

[8] It is clear that the substantial portions of the various steps involved in creating a reinforced concrete prestressed I-beam is done by the defendants. Each of the 3 steps to be done by the plaintiffs could only be done when the required steps before that had been completed by the defendants or by other sub-contractors.

[9] There can be no meaningful reliance on the proposed works programme to demonstrate that there was delay on the part of the plaintiffs as this works programme (as revised from time to time) was not before the Court. Unless the defendants are able to give sufficient particulars in respect of each beam, as to when in respect of the various steps it was ready for the plaintiffs to work on it and the delay by the plaintiffs in attending to the work, it cannot be said that the defendants have proved delay by the plaintiffs. **d**

[10] If the defendants are not able to particularize the delay by the plaintiffs but want to prove delay by the plaintiffs using the period of overall completion, the defendants will have to show that all the other relevant sub-contractors and the defendants themselves had completed what they had to do in good time in respect of each of the steps. Further, on the evidence available before the Court, it could not be determined who was to be blamed for the delay nor to what extent. **e**

[Judgment for the plaintiffs for RM185,297 less RM5,083 with costs; defendant's counterclaim dismissed.] **f**

Cases referred to:

Wickman Tools v. Schuler AG [1974] AC 235 (**cons**)

Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1970] AC 583 (**cons**) **g**

Legislation referred to:

Civil Law Act 1956, s. 11

Rules of the High Court 1980, O. 42 r. 12

Other sources referred to:

Halsbury Law 4th Edn., Vol. 4 para. 1225 p. 624

For the Plaintiffs - R.D. Rajasingam; M/s. Lewis & Co. **h**

For the Defendants - William J.K. Leong; M/s. Cheang & Ariff

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*a***JUDGMENT****VC George J:**

Background - Shortly stated the background and the position taken by the parties in this action is as follows.

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The plaintiffs' main claim is for the sum of RM185,297 said to be the balance due on a lump sum sub-contract in respect of prestressing work on 60 numbers of what are known as I-beams, 40 being intermediate beams and 20 being edge beams, for a reinforced concrete bridge to span the Klang river at Taman Sri Muda, Shah Alam in respect of the erection of which the defendants had been appointed as the main contractor by developers known as Newacres Sdn. Bhd.

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The said amount is inclusive of the sum of RM5,083 which the plaintiffs have billed the defendants as being the cost of 170 pieces of what has been referred to as "trumpets" which had been supplied by the plaintiffs to the defendants to be placed in designated positions in the steel cage skeleton for each of the 20 edge beams, 10 trumpets to each, before the beams were cast in concrete. Save for this amount of RM5,083 the plaintiffs claim of RM185,297 is admitted by the defendants. However the defendants say that a sum of RM12,000 has to

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be deducted from the admitted amount being the hire charges claimed by the defendants against the plaintiffs in respect of cranes that the defendants had provided to the plaintiffs for carrying out the prestressing works.

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The plaintiffs also say that the amount due should have been paid in progressive payments as and when progress claims were made and which in fact had been made and interest at 1.5% per month (as being reasonable interest on delayed payments) on the amounts that had not been paid on the progress claims made calculated from the dates that they should have been paid, should be paid by the defendants. This is computed to be RM34,099.04 as at 10 February 1985 and is claimed together with further interest at 1.5% *per mensem* on the RM185,297 from 11 February 1985 until realisation. The claim for interest is disputed by the defendants.

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Although the defendants have admitted the greater portion of the plaintiffs' claim, the defendants contend that the plaintiffs had failed to carry out the sub-contract works with due diligence and within the scheduled time that they say was allowed for the job and that thereby the defendants have suffered loss and damages computed in the statement of defence and counterclaimed as special damages in the sum of RM305,221 which amount the defendants say should be set-off against the plaintiffs' claim and that judgment should be entered against the plaintiffs for the balance. The computation appears to be based on what the defendants

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claim they had to pay as staff salaries and workmen's wages and in respect of the cost of use of equipment for a period of 2 months which they say is the period of the delay in completing the works which two months delay the defendants say was attributable to the plaintiffs' said lack of diligence in carrying out their sub-contract. The plaintiffs say that there was no delay; even if there was, it was only of about a month's duration and in any

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event any delay that there had been is not attributable to the plaintiffs.

The sub-contract

What exactly were the terms and conditions of the sub-contract was in issue and it is relevant to make a finding on what they were. It is convenient to deal with that at this stage.

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Although the quotation for the prestressing work in respect of the 60 numbers of I-beams was dated 29 September 1983 (produced in Court as AB3) and submitted at or about that date by the plaintiffs to the defendants, it would appear that in fact the plaintiffs had already commenced the sub-contract work well before that date, in August 1983. Kenny Tan Boon Keng, who is also known as Kenny Tan, the managing director of the defendant company, who had testified as the 2nd witness for the defendants had confirmed that there was initially a verbal contract between the plaintiffs and the defendants after entering into which the defendants had commenced the work in August. He said that it was he who had negotiated the sub-contract with the plaintiffs. What the terms of the verbal contract were was not disclosed to the Court by him. Kenny Tan had said, at p. 40 of the notes of evidence:

In fact we had a verbal contract with plaintiffs earlier. It was after the verbal contract that they started the work. That was well before 17 January 1984.

He went on to say:

The plaintiffs were aware of the work programme. In negotiating we first talked of the rate and then the schedule and we told them of the programme. I had highlighted that they must strictly follow our programme, that is, main contractor's programme.

Later in his testimony he said:

There had been a verbal contract first. I think it was after AB3.

I pause to note that in that he was clearly mistaken as there is indisputable evidence that the plaintiffs had commenced work in August 1983 and AB3, as has been seen, came into existence on or about 29 September 1983.

In submitting the quotation AB3, the plaintiffs had also submitted in writing the terms and conditions in respect of and to be read with the quotation. That was produced as AB79 and AB60. Chin Mee Poon, the managing director of the plaintiff company testified that it was he who had negotiated on behalf of the plaintiffs with the defendants. He testified:

I see AB3 - our quotation for the I-beams tensioning work. AB79-80 are the terms and conditions which form part of AB3.

Subsequent to our quotation there was some discussion. They asked for some discount. We agreed. Final prices agreed are shown in their purchase order AB10.

All the terms and conditions as stated in AB79-80 were adopted but they changed the payment terms by introducing a retention clause and they included 3 items which were not covered by our terms and conditions.

The purchase order referred to in Chin's testimony was dated 17 January 1984 and presumably was issued at about that date.

It is clear from the evidence that there was initially the verbal contract between the parties entered into in or about August 1983 after which the works were commenced by the plaintiffs followed by the formal quotation by the plaintiffs on or about 29 September 1983 at RM4,575 for 40 numbers of intermediate I-beams and at RM5,060 for 20 numbers of edge I-beams. Further works were carried out thereafter followed by discussions resulting in agreement being arrived at on the price. Thereafter the purchase order which is AB10 was issued.

As has been seen, it was Chin's testimony that in the course of the discussion before AB10 was issued, all the terms and conditions set out in AB79 and AB80 were adopted save for the provision of a retention clause and the provision of 3 terms and conditions not covered by AB79 and AB80.

- a** The first witness for the defendants, William Tan could not be relied on in trying to arrive at the terms and conditions of the sub-contract in that he had only come into the picture when he took over as project manager some 6 or 7 months after August 1983 - in March 1984. He obviously had no personal knowledge of what had transpired at the relevant period in August 1983 when the verbal contract had come into existence and even later when the plaintiffs submitted the quotation AB3 and even when the said discussions took place that resulted in agreement and the purchase order AB10. He did testify that when he took over in March 1984 he understood the position to be that AB10 was the contract between the parties. He does not disclose the basis of this understanding.

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- c** In AB79 and AB80 the plaintiffs had referred to items numbered 2.1 to 2.9 being services and/or supplies needed for the discharge of the sub-contract works set out as being the responsibility of the defendants. Item 2.5 was "cranage and hoisting facilities". William Tan conceded that all the items 2.1 to 2.9 were made available to the plaintiffs by the defendants and that the defendants were not charged for any of the items except in respect of item 2.5 in respect of which at the end of the contract the defendants had submitted a bill to the plaintiffs. William Tan said that he had been told by the supervisor that the supply of cranage and hoisting facilities was the plaintiffs' responsibility. He testified:

- d** Item 2.5 refers to cranage and hoisting facilities. I do not agree that under the contract Ken Construction had to provide that facility to Evergrip. My supervisor told me that that was Evergrip's responsibility.

I did supply the facility wherever the crane was free to Evergrip.

I did not tell them that they have to pay for the facility. I had assumed that my supervisor had told them about it at the precontractual period when terms were negotiated.

- e** Q: Is there anything in writing anywhere that Evergrip was to pay for the cranage and hoisting facilities.

A: Yes there was. It was in our final certificate of payment. AB71 & 73.

Q: Apart from that.

- f** A: I have to study our files.

(Nothing in writing on this point was in fact produced in Court).

- g** It is relevant to examine DW2 Kenny Tan's testimony in respect of this point. As has been seen, unlike the 1st defence witness, Kenny Tan was personally involved in the negotiations that culminated in the contractual relationship being arrived at between the plaintiffs and the defendants. What he has to say about the terms of the contract, found at p. 40 of the notes of evidence, has already been referred to hereabove. The only other reference made by him in respect of the terms of the contract are at pp. 49 and 50:

Q: I refer to AB3 and AB79 item 2.5. It was agreed that the main contractor supplied cranes and hoisting facilities.

- h** A: AB79 was attached to their quotation with terms and conditions to be negotiated.

The contract is AB10.

- i** I pause to note that En. William Leong of Counsel for the defendants cautioned against construing an agreement in the light of the subsequent actions of the parties. *Wickman Tools v. Schuler AG* [1974] AC 235 was cited in which *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] AC 583 was applied.

Here the issue is not one of construction of a term or terms of a contract. The terms of a contract have to be identified before embarking on any exercise in respect of the true construction thereof. What the Court is called upon to determine here is whether the terms and conditions set out in AB79 and AB80 are to be read as being part of AB10. a

Clearly what is set out in AB79 and AB80 are relevant terms and conditions without which there could not be a meaningful contract between the parties, without which the contract could even be said to be bad for uncertainty. b

What we have, is the plaintiffs coming up with AB3, AB79 and AB80 and the defendants coming back with AB10 in which reference is made to four terms and conditions, three of which were not dealt with at all in AB70 and AB80 and the last qualifying the terms for progress payments which had been provided for in AB79 and AB80. It is useful to set out the terms in respect of progress payment in AB79 and AB80 and in AB10. c

The plaintiffs have it in AB79 and AB80 as:

The main contractor shall make monthly progress payment to us within two weeks from the date of our claim/invoice without retention based on the total worth of work done and materials on site.

The defendants have it as follows in AB10: d

A: All progress payment claims are subject to 10% retention paid up to a maximum of 5% of contract sum.

Now, it is to be noted that no reference to progress payments is made anywhere else in AB10. While clearly the defendants accept that payment for the work is to be effected progressively - they obviously expect to look elsewhere for further details of progress payments without which the contract could flounder for want of certainty. The question that arises in respect of the said term and condition 4 to AB10 is, what progress payments are the defendants referring to? And in the absence of evidence to the contrary which is not available, the answer dovetails to the offer of the plaintiffs that the defendants were responding to namely AB3 and AB79 and AB80. In my judgment reading the documents AB3, AB79 and AB80 and AB10 in the context and assuming that the intention of the parties was to arrive at a contract that is not bad for uncertainty it cannot but be that AB10 was meant to be read with AB79 and AB80. I hold that all terms set out in AB79 and AB80 were accepted unless rejected or watered down or amended by AB10. Condition 4 in AB10 gives life not only to the progress payment condition in AB79 and & AB80 but to all the other terms and conditions set out therein. It is to be noted that this conclusion has been arrived at on a balance of probability without resort to the later conduct of the parties. Accordingly even if *Wickman Tools (supra)* and *Whitworth Street Estates (supra)* apply, it cannot be said that the above finding was arrived in contravention of the rule in those two cases. e

I also do not consider that any rule is being flouted when I further note that the conduct of the parties before and after AB10 was issued demonstrates that at all relevant times they conducted themselves on the basis that the terms and conditions set out in AB79 & AB80 were terms and conditions of the sub-contract. *Inter alia* electricity, water, welding sets and portland cement, the supply of which had been provided for in AB79 and AB80, were apparently all supplied by the defendants according to those provisions without imposing a charge on the plaintiffs therefore. The 1st witness for the defence William Tan conceded thus: f

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- a** Yes I agree that all the items 2.1 to 2.9 apart from 2.5 in AB79 were supplied or made available by (the defendants).
- Cranage and hoisting facilities were also supplied. It was only at the end of the contract that the defendants made a claim for the use of the cranes.
- b** Also where the plaintiffs had hired cranes from 3rd parties, debit notes were submitted to the defendants "being hiring of cranes made on your behalf ..." which debit notes were accepted by the defendants without protest.
- Charge by the defendant for cranes and hoisting equipment.**
- It follows that the claim under this head by the defendants was misconceived and in any event has no merit.
- c** **Charge by the plaintiffs for the 170 trumpets**
- It can be seen from AB10 that what the plaintiffs were required to do was to "supply materials, equipment and labour for the prestressing works" for the 60 numbers of beams. These were the longitudinal beams.
- d** By AB79 and AB80 it is provided that the plaintiffs were to fabricate the prestressing cables, install them "within the beam reinforcement cages to the specified profile including the fixing of anchorage components", stressing of cables and cutting off excess length, sealing and grouting to complete the prestressing work.
- e** Short lengths of metal tubes one end opening out like a trumpet and hence called trumpets were also to be installed with the beam reinforcement cages of each of the 20 numbers of edge beams. This was to be done before the casting in concrete took place. DW1 conceded that the trumpets were not necessary for and had nothing to do with the prestressing of the longitudinal beams. The plaintiffs were not involved in the casting or stressing of the transverse beams. The stressing of these beams was to be effected by a process described as post stressing. That contract went to others. The casting of those beams was also the responsibility of the defendants. DW1 explained that the trumpets had to be cast in the edge beams so that post stressing of transverse beams could be effected.
- f** The plaintiffs had supplied 170 of the 200 trumpets needed and had installed them in the specified positions in respect of each of the edge beams when the reinforced cages were being assembled. They now claim that the defendants should pay for those 170 trumpets. The onus is on the plaintiffs to prove that the defendants have to pay for the trumpets. There was nothing said expressly or by implication in AB3, AB10 or AB79 and AB80 in respect of the trumpets. There is in fact no mention of them at all. Even in the drawings supplied to the plaintiffs in respect of the edge beams there is no reference to or any provision for the trumpets.
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- h** For the defendants it was submitted that the fact that the plaintiffs supplied the 170 trumpets shows that they accepted that it was their obligation to do so. Further it was contended that the difference in the price of the intermediate I-beams and the edge beams of RM507 per beam was because of the additional costs to be incurred by the plaintiffs for supplying the trumpets. In the defendants' letter to plaintiffs of 20 August 1984 (Exhibit NAB(A) 16), they say:
- ... all trumpet casting should be supplied and installed (by plaintiffs) as your price for edge beams is RM507 more expensive than the intermediate beams.
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In the second page of the letter the writer concedes that the strands used for prestressing of the edge beams could cost more than the other beams but estimates that the extra costs of the strands and extra labour "... is hardly more than RM200 per beam ..."

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It is to be noted that this letter was written almost a year after the plaintiffs had commenced work on their sub-contract. It seems to me that this seems to be more of an imposition of a new term rather than the reiteration of what had been agreed previously.

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In testimony in Court, DW1 William Tan conceded that that estimate of RM200 was an under-estimation. His own figures gave RM434 for the extra strands, wages and labour leaving only RM63 for the trumpets which even at the defendants' suggested cost of the trumpets at RM14 each was not sufficient for the 10 trumpets needed per beam. DW2 did not provide any useful evidence in his testimony in Court in respect of the trumpets.

PW1 Chin Mee Poon in his testimony said that at no time was the issue of who should pay for the trumpets discussed. He says that the plaintiffs had bought and supplied the 170 numbers of the trumpets on the assumption that they would obtain the post-stressing contract in respect of the transverse beams. This suggests that his view appeared to be that it was for the persons doing the post-stressing work on the transverse beams to supply the trumpets which does sound logical since the trumpets were to be cast into the beams only for the purpose of effecting the post-stressing work on the transverse beams.

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While I am satisfied that there was no call for the plaintiffs to supply the trumpets, having done so without laying any conditions for doing so they have no cause of action as against the defendants in respect of the costs of the trumpets. They took the risk of supplying the trumpets and installing them in the expectation of getting the post-stressing work contract. That they did not does not entitle them to charge for the trumpets they had so supplied. Taking everything into consideration it is my judgment that the plaintiffs have failed to prove that there was a contractual or other obligation on the part of the defendants to pay for the trumpets.

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Interest

Following my finding that the terms and conditions of the contract are those set out in AB3 read with AB79 and AB80 it has to be accepted that the plaintiffs were entitled according to the terms set out in those documents to be paid progressively on a monthly basis, payment to be made within 2 weeks from date of claim/invoice based on the total worth of work done and materials on site less (as imposed by AB10) 10% to be held back as a retention fund but the amount retained not to exceed in the aggregate 5% of the lump sum contract sum.

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Progress payment claims were submitted one in each of the months of January, February, March, May and August 1984 based on the alleged value of work done. Only part payment was made. The plaintiffs claim interest on the late payments computed at 1.5% per month. Full details of date and amount of claims made and payment effected were submitted to the defendants and exhibited to the Court as AB69.

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In his submission, Counsel for the defendants says that the defendants had paid the plaintiffs promptly and in accordance with the terms of the sub-contract.

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However in his testimony DW2 Kenny Tan, the managing director of the defendant company, conceded that the defendants had not paid according to the tenor of the progressive payment claims made. He tried to justify that by explaining that in the view of the defendants, payments had to be made only on completed beams. He also said that another reason for not effecting payment on claims they made was that the defendants had noticed that the grouting on

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a some of the beams was defective. Eventually the grouting problems, Kenny Tan conceded, were resolved and all the beams were accepted. When asked why payments were not made thereafter, he said that it was because the plaintiffs had delayed completing their work as a result of which the defendants had suffered damages.

b The terms in respect of payment had already been examined hereabove - the progress payment claims were to be "based on the total worth of work done and materials on site". There is no basis for the defendants' contention that payments had to be made on completed beams only. Using the suspected defects in the grouting also provide no acceptable justification for withholding progress payments. The defendants had no business withholding progress payments on this count when they were already holding back 10% as a retention fund. In *Halsbury* 4th Edn., Vol. 4 para. 1225 at p. 624 retention money is explained as being:

c ... retained ... as a security, for the due performance of the contract by the contractor and as a fund to be drawn upon either to complete the works or to rectify defects ...

In any event as it turned out, the employers finally accepted the beams. Even then the amounts were not paid.

d A Court of record is empowered to award interest for the recovery of any debt or damages at such reasonable rate as it thinks fit for the whole or any part of the period between the date when the cause of action arose until judgment - see s. 11 of the Civil Law Act - and thereafter where there is no contractual rate, until realisation at a rate not greater than 8% per annum - see O. 42 r. 12 Rules of the High Court 1980.

e As to the excuse that the defendants were entitled to damages for delay, that excuse was certainly not reasonably available in respect of the earlier claims for progressive payments. Even if it is found that there is delay it seems to me that the first 4 claims should have been paid within 2 weeks of each of them being submitted. The purpose of progressive payments in the context of contracts of this type is to provide a cash flow to enable the contractor to finance the works. In my judgment in any event interest should have been paid by the defendants on the amounts outstanding on the said first 4 claims from the dates they were outstanding until judgment, at 12% per annum (which I think is more reasonable than the 18% per annum claimed) and thereafter until realisation at 8% per annum.

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Delay

In AB10 the purchase order by the defendants accepted by the plaintiffs it was provided that:

g All materials, delivery schedule and works schedule must follow the main contractor's works programme or wherever instructed according to urgency of works ...

AB81 is the proposed works schedule. Work was to commence in February 1983 and completed by end of July 1984. Admittedly the proposed works programme was not followed by the main contractor. It was revised from time to time. In fact according to DW1, although the defendants had been given possession of the site they could not commence the works according to the original schedule because *inter alia* necessary approvals from Government or Government Agencies had not been obtained by the employer.

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According to NAB (A) 16, the 1st of the 60 numbers I-beams were cast by the defendants only in mid August 1983 and the last beam "completed" on 4 July 1984 whereas according to the works schedule AB81, casting of the beams (by the defendants) should have started on 1 June 1983.

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The defendants' managing director in giving evidence in respect of the works schedule was inclined to be evasive. When asked (see p. 52 of notes of evidence) whether the schedule of works was not revised on a number of occasions his reply was that he was not sure. On being pressed by Counsel for the plaintiffs inviting his attention to contemporaneous documents he had to and conceded that it "was revised from time to time". He also had to and conceded that as to the works programme, "some were followed and some were not followed." He conceded that pier works were delayed by 4 months and that that had nothing to do with the plaintiffs.

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The works in respect of the building of the bridge included all the works under the board heads: site clearance, road embankment and roads, piling, casting and erecting the pier columns, casting and stressing of PC beams and of diaphragm beams, casting deck slabs and constructing railings. The permission and/or consent of the various authorities had to be obtained before some of the works could be undertaken. This was not always forthcoming in due time. Some of the works were to be done by the defendants, much of the works were to be done by various specialist sub-contractors.

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The plaintiffs were also specialist sub-contractors whose work in the whole exercise, vital as it were, represented only a small percentage, of the overall work. The 60 beams they were involved in was only a portion of the superstructure (which in turn represented only a portion of the overall works). And in respect of the 60 beams itself their work was in terms of percentage small.

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In the construction of an I-beam the defendants had to construct a casting bed made of plywood and wooden sleepers. The reinforced steel cage for the beam is then constructed and laid at length on the casting bed. This is also not done by the plaintiffs. However at that stage the plaintiffs have to put in position in the steel cage, ductings with steel strands threaded into them, the later stressing of which provides the stress needed for the beams. After this, steel moulds are erected in position by the defendants before they pour in the concrete. After the concrete has set the steel moulds are removed by the defendants. After that the initial stressing is done - by the plaintiffs. Thereafter the defendants have the beams moved from the casting bed to be kept aside to gain strength as the concrete hardens. It is only when the required strength is achieved as decided by the defendants that the plaintiffs are required to apply the final stressing. This is apparently done by having one end of the strands that had been threaded in the ducts in the beams anchored and the other end pulled taut until the required strength is reached after which concrete is pumped under pressure into the duct - a process known as grouting. After the concrete has set there has to be patching of the areas where the anchor was and the plaintiffs' work is done. The final stressing is normally ready to be applied some 21 to 25 days after the beam was first cast.

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Clearly the substantial portion of the works involved, the substantial portions of the various steps involved in creating a reinforced concrete prestressed I-beam is done by the defendants. It was pointed out that each of the 3 steps to be done by the plaintiffs could only be done when the required steps before that had been completed by the defendants or by other sub-contractors whether they be steel bar tenders or concretors and so on. Each beam was a separate exercise and there were 60 of them. In the context, there can be no meaningful reliance on the proposed works programme AB81 to demonstrate that there was delay on the part of the plaintiffs. It seems to me that unless the defendants are able to give sufficient particulars in respect of each beam, as to when in respect of the various steps it was ready for the plaintiffs to work on it and the delay by the plaintiffs in attending to the work, it cannot be

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a said that the defendants have proved delay by the plaintiffs. No doubt the defendants have pointed out to many letters and records of many meetings where the delay on the part of the plaintiffs were referred to but none of these particularise the delay sufficiently for the Court to meaningfully find that there was delay on the part of the plaintiffs.

b The contention that according to the works programme the casting of the PC beams was to be completed in 9 months and in fact was completed in 11 months *per se* does not help. The defendants themselves concede that the commencement of the works were delayed through no fault of the plaintiffs. If the defendants are not able to particularise the delay by the plaintiffs but want to prove delay by the plaintiffs using the period of overall completion, the defendants will have to show that all the other relevant sub-contractors and the defendants themselves had completed what they had to do in good time in respect of each of the steps.

c All that I have been able to conclude in respect of delay is that there was delay in completion of the works but what exactly was the delay in completion of different stages of the works is not known because the works programme applied from time to time (it was revised from time to time) was not before the Court. Further, who was to be blamed for the delay and to what extent cannot be worked out on the evidence made available to the Court. In my judgment the defendants have failed to prove such delay on the part of the plaintiffs as to justify their not paying the plaintiffs what was due to them.

d It follows then that there has to be and will be judgment for the plaintiffs in the sum of RM185,297 less RM5,083 being the amount claimed for the trumpets together with interest at 12% per annum on the amounts claimed in each of the progress claims made to be calculated for the period 14 days after the date of each of the progress claims until the date hereof and thereafter at 8% per annum until realisation. The defendants will also pay the costs of the plaintiffs' claim as taxed by the proper officer of the Court. The defendants' counterclaim is dismissed again with costs to be taxed by the proper officer of the Court.

Also found at [1991] 3 CLJ 2149

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